No. 83-1988

In the Supreme Court of the United States

OCTOBER TERM, 1984

GIOVANNI MASI a/k/a "JOHN MASI," PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the admission of a co-conspirator's statements was invalid under Fed. R. Evid 801(d)(2)(E) or the Sixth Amendment Confrontation Clause.

2. Whether typed transcripts of recorded phone calls were properly given to the jury at its request during deliberations, when the transcripts had already been admitted into evidence and shown to the jurors without objection during trial.

3. Whether the trial court lacked jurisdiction over the offense charged in Count III, which took place in Florida, although no specific request for a change of venue was made in the trial court.

4. Whether the trial judge should have given, *sua sponte*, a cautionary instruction with respect to the opening statement of petitioner's counsel concerning petitioner's possession of a vial of cocaine, not offered in evidence at the trial.

5. Whether the prosecutor improperly commented on petitioner's failure to testify during his rebuttal argument to the jury.

6. Whether petitioner's sentence was too severe.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Constitution, statutes and rules:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1984. The petition for a writ of certiorari was filed on June 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiring to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846, and on two counts of aiding and abetting the distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner was sentenced to concurrent ten-year

prison terms on all three counts and additional concurrent ten-year special parole terms on the aiding and abetting counts. The court of appeals affirmed (Pet. App. B1-B4).

The evidence adduced at trial showed that petitioner was involved, along with "Joe" Cinelli, in illegal drug transactions in New York and Florida.[1] A government informant named "George" set up a "buy" on December 1, 1982, between Cinelli, who resided in Miami, Florida, and DEA Agent Edward Hamill at a Long Island restaurant (Tr. 40-44, 77-80). Although Hamill asked to buy only one of the five ounces of cocaine Cinelli offered for sale, he indicated his intention to buy large quantities in the future. Cinelli assured Hamill that he "would have no problem providing * * * kilogram quantities of cocaine" (Tr. 44, 54). The sale was consummated outside the restaurant, where an FBI agent observed Hamill purchase an ounce of cocaine from Cinelli for $2,000. The cocaine was compacted into small, white balls, a bit larger than a marble. Cinelli explained that this was pure cocaine, ingested by couriers from Colombia, who excreted it on arrival in the United States. Tr. 45-56, 126-127, 201.

While still in Hamill's car during this same transaction, Hamill and Cinelli negotiated for the sale of four kilos of cocaine, eventually agreeing on a price of $52,000 per kilo. Nevertheless, Cinelli told Hamill that the price was "subject to his partner in Miami, John's approval" (Tr. 52). Cinelli told Hamill that delivery from Florida would have to be approved by "John" (Tr. 51). Later, on December 7, 1982, Agent Hamill telephoned Cinelli in Miami, who said that he had discussed the deal with "John in Miami, his partner and

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[1]Prior to trial, Cinelli pleaded guilty to aiding and abetting petitioner in distributing cocaine, in exchange for the government's agreement to move for dismissal of other charges. On August 24, 1983, Cinelli was sentenced to four years' imprisonment and a six year special parole term.

roommate," and that they were reluctant to come to New York at that time (Tr. 54-55).[2] In a subsequent recorded conversation on December 10, 1982, Cinelli informed Hamill that he had discussed the situation with "the man," his "partner John," and that John would not authorize him to bring four kilograms of cocaine to New York. Rather, John insisted that Hamill come to Miami to purchase the cocaine and that the price would be $54,000 per kilo (Tr. 55-56, 65). When Hamill protested about coming to Florida and the new conditions, Cinelli said "this is the way its gotta be, you know, I can't do anything else, you know. If I was the man, if I was John, you know, then I would take the gamble" (Tr. 69).

After additional calls setting up the deal, in which Cinelli again advised that he had to obtain John's approval (Tr. 78-80), Agent Hamill arrived in Miami on February 6, 1983, accompanied by the informant "George" and several FBI agents. Hamill spoke with Cinelli in a recorded conversation about "John's" demand for payment of $7,200 before any transaction, which sum was to cover the loss of three ounces of cocaine that Cinelli had brought to New York in December. Hamill was told to call back in half an hour, when John would have returned (Tr. 85-86, 95-98). When he called, "John" answered the phone; he stated that he did not want to talk about the new terms proposed by Hamill for the deal, and hung up (Tr. 98-99). However, George later called "John" and discussed the $7,200 debt arising out of the lost cocaine balls (Tr. 87-88, 99-100). "John" told George that "[w]hen you get seventy-two hundred together, I'll talk to you."

The following day, Hamill and George met Cinelli and petitioner, accompanied by an unknown man, at a Miami restaurant, while an FBI agent observed the meeting from a

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[2]This telephone conversation was recorded but due to faulty equipment was inaudible (Tr. 130-131).

nearby table (Tr. 104-105, 204-205). Cinelli introduced petitioner to Hamill as his "partner, John." Hamill, Cinelli, and petitioner discussed payment for the lost three ounces of cocaine (Tr. 103). Cinelli began the conversation by stating that three ounces of cocaine from the amounts "John" had authorized him to sell Hamill the previous December were missing. Petitioner stated that, since Hamill had been the designated purchaser, he was responsible for the loss. Tr. 103. Petitioner also stated that "once the $7,200 debt was cleared up he would do unlimited quantities of cocaine," adding that "the coke was located five or ten minutes from the restaurant" (Tr. 104). Hamill offered to pay more for the first kilo to cover the cost of the debt; this offer was accepted by petitioner (*ibid.*). Later that evening Hamill spoke to petitioner by telephone and offered to purchase four ounces of cocaine for $15,000, a price $7,000 over its value, as a sign of good faith. Petitioner agreed and assured him that following this transaction "we could do the six keys" (Tr. 105-106).

Hamill met with petitioner at the restaurant the next day (Tr. 107). After discussing the $15,000 deal, petitioner indicated that he would "authorize Joe to do the six kilos * * * as soon as this deal goes" (Tr. 108).[3] Later they went outside to petitioner's Mustang, where petitioner removed a manilla envelope containing a plastic bag "filled to capacity" with small white powder "balls" that looked just like the cocaine involved in the New York deal (Tr. 110). As agents approached petitioner's car in their vehicles, petitioner escaped (Tr. 234-237); he was arrested by DEA agents at his residence in Miami several weeks later (Tr. 238-242, 248-249).

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[3]At this meeting, petitioner reiterated that he had "authorized Joe Cinelli to sell [Hamill] five ounces of cocaine up in New York" and that "when Cinelli returned from Florida three ounces were unaccounted for." Tr. 107-108.

ARGUMENT

1. Petitioner contends (Pet. 11-16) that Cinelli's out-of-court statements were improperly admitted as co-conspirator's statements under Fed. R. Evid. 801(d)(2)(E), and in violation of Confrontation Clause of the Sixth Amendment. This fact-bound argument is totally without merit and warrants no further review by this Court.

In order to admit co-conspirator statements under the Rule there must ordinarily be a showing by a preponderance of independent evidence (1) that a conspiracy existed; (2) that the declarant and the defendant against whom the statement is admitted were both members of the conspiracy; and (3) that the statement was made in furtherance of the conspiracy. *United States* v. *Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).

Petitioner argues that there was no independent evidence that he was involved with Cinelli in December 1982, or that the statements were in furtherance of the conspiracy. However, the court of appeals properly found that there was "ample evidence, independent of Cinelli's statements" (Pet. App. B2) that petitioner was a member of the conspiracy to distribute cocaine; it also found that Cinelli's statements in furtherance of the conspiracy were reliable. The same finding having been reached by both lower courts (see Tr. 279), further review by this Court is unwarranted. See *Berenyi* v. *Director, Immigration and Naturalization Service*, 385 U.S. 630 (1967).

The facts of the case, recounted in detail above, plainly support the lower courts' findings. Petitioner himself told Hamill at their first face-to-face meeting on February 8, 1983, in Miami that he had "authorized" Cinelli to sell him

five ounces of cocaine the previous December in New York and that he was holding Hamill responsible for the "loss" of three ounces of cocaine in that transaction. The sequence of face-to-face meetings and telephone calls between Hamill and petitioner in Florida, in which petitioner repeatedly said he would sell six kilos of cocaine to Hamill after he compensated him for the three ounces lost in New York, constitutes ample evidence that a conspiracy existed from December 1, 1982, that petitioner and Cinelli were participants in the conspiracy, and that Cinelli's statements were in furtherance of the conspiracy.[4]

Petitioner argues in the alternative (Pet. 13-16) that Cinelli's out of court statements violated his Sixth Amendment confrontation rights despite their admissibility under Fed. R. Evid 801(d)(2)(E). This argument was properly rejected by the courts below (Pet. App. B4).

First, as already noted, there was more than ample evidence demonstrating the reliability of Cinelli's statements. It is indeed difficult to imagine more copious corroboration of out-of-court statements than was adduced in this case.

Second, petitioner challenges whether Cinelli was "unavailable." As a legal matter, statements admissible under Fed. R. Evid. 801(d)(2)(E) are not defined as "hearsay" under the Federal Rules of Evidence, and thus are not subject to any requirement of "unavailability." See generally *United States* v. *Gibbs*, 739 F.2d 838, 848 nn. 22, 23 (3d Cir. 1984) (en banc). But even assuming that unavailability is required, the

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[4]The aborted drug deal between petitioner and Hamill involving "balls" of cocaine similar to that sold by Cinelli in New York, together with petitioner's flight from the scene, provide additional independent evidence of the conspiracy and of the reliability of Cinelli's statements.

statements statisfied the standard. Cinelli appeared in court and invoked his Fifth Amendment privilege against self-incrimination on advice of counsel (Tr. 259, 266-268). Petitioner recognizes (Pet. 15) that an assertion of the privilege can render a witness "unavailable" (see *Holt* v. *Wyrick*, 649 F.2d 543 (8th Cir. 1981), cert. denied, 454 U.S. 1143 (1982)), but argues that Cinelli should have been given immunity, obviating the need to assert the privilege, or alternatively that the privilege was asserted because of Cinelli's belief that he was required to do so under the plea agreement. Contrary to petitioner's assertion (Pet. 15-16), Cinelli did not invoke his privilege because of his plea agreement, but because charges were pending against him (Tr. 270, 275).[5] Nor does petitioner offer any reason for departing from the settled rule that the court "ordinarily need not grant statutory immunity to defense witnesses" (*United States* v. *Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982)).

2. Petitioner also contends (Pet. 16-18) that the trial judge abused his discretion when, at the request of the jury, he supplied it with typed transcripts of the recorded conversations, cautioning the jurors that the transcripts were limited to use as an aid as they listened to "the primary evidence" (Tr. 63-64, 93-94). In the absence of any objection to the prior admission of the taped transcripts into evidence or to their accuracy at trial or on appeal, there is absolutely no showing that the trial judge abused his discretion when he made them available to the jury at their request, subject to appropriate instructions. See *United States* v. *Koska*, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971). Contrary to petitioner's argument that there is a

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[5]The remaining two counts were still pending against petitioner while he was awaiting sentencing on Count III. In response to an argument by petitioner's counsel, the judge told Cinelli he could withdraw his guilty plea. Tr. 270, 275.

conflict among the circuits, the court in *United States* v. *John*, 508 F.2d 1134 (8th Cir.), cert. denied, 421 U.S. 962 (1975), did not preclude the jury from using transcripts of tape recordings during deliberations, but simply held that there was no abuse of the trial court's discretion under the facts there.

3. Petitioner next contends (Pet. 18-20) that his conviction on Count III must be reversed because he was denied his right to be tried in Florida, where the offense was committed. However, he failed to object to venue in the district court, and the court of appeals correctly held that his claim was waived due to his failure to raise it in timely fashion. Fed. R. Crim. P. 12(b); *United States* v. *Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980); *United States* v. *Menendez*, 612 F.2d 51, 55 (2d Cir. 1979); *United States* v. *Price*, 447 F.2d 23, 27 (2d Cir.), cert. denied, 404 U.S. 912 (1971). Although petitioner asserts (Pet. 20) that "[t]he Court of Appeals below has overlooked the matters of record in this case," he neither cites to nor quotes any timely motion expressly raising the question of venue or otherwise supporting his charge. Plainly, petitioner has not identified any "such departure from the rules of law as to call for an exercise of this Court's power of supervision" (*ibid.*).

4. Petitioner contends (Pet. 20-22) that the trial judge was required, sua sponte, to give a cautionary instruction when petitioner's counsel made reference in his opening statement to a vial of cocaine found in petitioner's pants when he was arrested. However, petitioner concedes (Pet. 22) that he has no legal authority to sustain this claim. In any event, the government did not offer this evidence at trial, and the comment was fleeting in nature. Accordingly, counsel may have properly concluded that any instruction would have only highlighted the statement. Certainly, no error, much less the "plain error" necessary to warrant reversal (see, *e.g.*, *United States* v. *Cano*, 702 F.2d 370, 371 (2d Cir. 1983)), has been shown here.

5. Petitioner also claims (Pet. 23-25) that it was error for the trial court not to grant a mistrial due to a comment by the prosecutor in rebuttal, which petitioner claims was a comment on his failure to testify. However, it is clear from the context in which the comment was made that the court below was correct in finding that the comment was inadvertent, and in any event was not of such a nature that the jury would take it to be a comment on the accused's failure to testify. *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1269 (2d Cir. 1969), cert. denied, 397 U.S. 1050 (1970).[6] Petitioner does not challenge the propriety of the standard employed below in determining whether reversal is required, but argues only the fact-bound claim that the wrong conclusion was reached under that standard.

6. Finally, petitioner complains (Pet. 25-27) that his sentence was "particularly severe." The court below properly disposed of this contention by noting that the sentence of ten years was well within the statutory range (Pet. App.

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[6]In response to petitioner's counsel's argument that the government failed to prove its case because not all conspiritorial calls and meetings had been recorded, the Assistant U.S. Attorney replied:

> Now, Mr. Jacobs raises questions, he said he counted a series of fif[teen] meetings and telephone conversations. I will tell you frankly I was not here during the course of the trial with a calculator counting how many meetings or telephone conversations there were. I don't believe it was particularly important.
>
> Mr. Jacobs said there were only four of the telephone conversations successfully recorded. We know four telephone conversations were successfully recorded. *The defendant can explain that — Mr. Jacobs can't explain that away, ladies and gentlemen,* because we all heard the conversation. Two of them were with this defendant sitting here. (Indicating). And Agent Hamill identified Mr. Masi's voice on both of those telephone conversations.

(Tr. 325-326) (emphasis added).

It is obvious that the words "the defendant can explain that" were an innocuous "slip of the tongue," as the trial judge found (Tr. 343).

B4). Petitioner does not dispute that his sentence (the possible maximum was 45 years) falls well within the statutory limits. His argument is therefore frivolous. See *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974); *United States* v. *Tucker*, 404 U.S. 443, 453 (1972); *United States* v. *Mennuti*, 679 F.2d 1032, 1037 (2d Cir. 1982).

CONCLUSION

The petition for a writ of certiorari should be be denied.

Respectfully submitted.

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